IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2047 OF 1998

Vijayendra Rajarao Hallar ... Petitioner

v/s

1. The State of Maharashtra

2. Shri A.M.Thatte,

Executive Engineer (Electrical)

Public Works Department,

Office of the Chief Engineer,

(Electrical) 3rd floor,

Administrative Bldg, Rationing

Compound, Chemburkar Marg,

Chembur, Mumbai-71.

.. Respondents

Mr.C.J.Sawant with Mr.K.T.Verghese for the Petitioner

Mr.P.M.Pradhan with Mr.M.D.Lonkar for Respondent no.2

Ms S.S.Bhende with Mr.A.H.Palekar A.G.Ps for

Respondent no.1.

..

WITH WRIT PETITION NO. 2048 OF 1998

Jayant Ramdas Choudhari ... Petitioner

v/s

1. The State of Maharashtra

2. Shri A.B.Thatte,

Executive Engineer (Elec)

Public Works Department,

Office of the Chief Engineer,

(Electricals) 3rd fl,Administrative

Bldg, Rationing Compound,

Chemburkar Marg, Chembur, Mumbai-71.

..

Mr.C.J.Sawant with Mr.K.T.Verghese for Petitioner

Mr.P.M.Pradhan with Mr.M.D.Lonkar for Respondent

No.2.

Ms S.S.Bhende with Mr.A.H.Palekar A.G.Ps. for

Respondent no.1

WITH WRIT PETITION NO. 2049 OF 1998

Subhash Pundalik Islur ... Petitioner

v/s

1. The State of Maharashtra

2. Shri A.B.Thatte,

Executive Engineer (Elec)

Public Works Department,

Office of the Chief Engineer,

(Elec) 3rd fl, Administrative

Bldg, Rationing Compound,

Chemburmar Marg, Chembur,

Mumbai-71.

... Respondents.

..

Mr.C.J.Sawant with Mr.K.T.Verghese for Petitioner

Mr.P.M.Pradhan with Mr.M.D.Lonkar for Respondent no.2.

Ms S.S.Bhende with Mr.A.H.Palekar A.G.Ps.for Respondent no.3

CORAM : A.P.SHAH AND D.G.KARNIK, JJ

DATE : 3RD OCTOBER, 2003.

P.C.

1. Petitioners herein challenge the common judgment and order dated 4th March, 1998 passed by the Maharashtra Administrative Tribunal (for short M.A.T.) in O.A.No.849 of 1996, O.A. No.883 of 1996 and O.A.No.876 of 1996 filed by the respective petitioners in these petitions.

The facts giving rise to the petitions briefly stated are as follows :

2. The respondent Mr.A.M.Thatte who is the common

private respondent in all the writ petitions and who holds a Bachelor's Degree in Engineering (Electrical) joined Agriculture and Cooperation Department on 16th June, 1970 as a Junior Engineer. He was promoted as a Deputy Engineer 3rd December, 1977 and was further promoted as an Executive Engineer on 23rd May, 1985. One Mr.S.L.Patil who is not party to either of the petitions joined Agriculture and Cooperation Department as a Junior Engineer (Electrical) in May, 1971 and after obtaining degree in Electrical Engineering approached this court by filing a Writ Petition No. 886 of 1988 challenging the promotion of Mr.Hullar, the petitioner in Writ Petition No.2047 of 1998. The said writ petition was transferred to the Maharashtra Administrative Tribunal (For short the M.A.T.) and registered as T.A.No.519 of 1999. The Division Bench of M.A.T. issued certain directions regarding dates/deemed dates of promotion. In view of these directions ofthe M.A.T. it was necessary to fix and give the deemed dates of promotionto Mr.Hullar and also Mr. Thatte. Accordingly, by a government decision dated 10th July, 1996 the deemed dates for promotion of Mr. Hullar and Mr.Thatte were refixed. The deemed date of promotion of Mr. Hullar were postponed. The deemed date of promotion of Mr. Thatte were advanced

because on account of the postponement of the date of promotion of Mr. Hullar vacancy would have arisen and would have been available for the appointment of Mr. Thatte. Accordingly, for the post of Dy.Engineer instead of actual date of promotion of 13th December, 1977. Mr. Thatte was given deemed date of promotion of 1st February, 1974. So far as the post of Executive Engineer is concerned, Mr. Thate was given a deemed date of promotion of 1st April, 1982 in place of actual date of promotion of 23rd August, 1985. It is to be noted that in the year 1981 to 1985, when the respective seniority of Mr.Hallur and Mr.Thatte were fixed, there were only two eligible persons in the Agriculture and Cooperation Department. The petitioners in Writ Petition no. 2048 of 1998 and Writ Petition No. 2049 of 1998, at that time, were employed in Public Works Department of the Government of Maharashtra. It appears that in the year 1990, Electrical wing of Agriculture and Coooperation Department was merged with that of Public Works Department and accordingly, a common seniority list was prepared. On account of giving advanced deemed date of promotion to Mr.Thatte, he became senior to Mr.Choudhari and Mr.Islur and therefore they felt aggrieved and filed O.A.No.883 of 1996 and O.A.No.876 of 1996 before the

M.A.T. Mr. Hallur who had also became junior to Mr.Thatte also filed O.A.No.849 of 1996 before the M.A.T. Since all the three O.A.s related to common facts in which Mr.Thatte was a commmon private respondent, they were heard and decided by the M.A.T by a common judgment dated 4th May, 1998.

3. During the pendency of the writ petition, Mr. Hallur has retired and therefore Writ Petition No.2047 of 1998 has become infructuous and is accordingly dismissed. Grievances of the petitioners in Writ Petition Nos. 2048 of 1998 and 2049 of 1998 are as follows :

4. Though Mr. Thatte was given the deemed date of promotion as a Deputy Engineer with effect from 1st April, 1974 in place of 13th July, 1977, he actually worked as Deputy Engineer from 13th December, 1977. As per Rule No.2 (II) (b) of RecruitmentRules, 1978, seven years experience as a Deputy Engineer is required for further promotion to the post of Executive Engineer. The said 7 years experience for Mr.Thattee can be counted only from 13th December, 1977 i.e. the actual date of appointment as Deputy Engineer and not from the deemed date of promotion 1st April, 1974. Therefore, Mr. Thatte became

eligible for promotion as a an Executive Engineer only with effect from 13th December, 1984. Mr. Thatte could not have been given the deemed date of promotion as an Executive Engineer from 1st April, 1982 or on any date earlier than 13th December, 1984. In support, learned counsel for the petitioner relied upon a judgment of the Supreme Court rendered in Union of India and ors v/s M.Bhaskar & ors reported in (1996) 4 SCC 416. In that case, the eligibility criteria for promotional post of Grade I Commercial Inspector was two years experience as a Commercial Inspector Grade II. Respondent was appointed to the post of Commercial Inspector on 21st September, 1989. However, he was given the deemed date of appointment as 11th October, 1988. While considering whether the experiences should be counted from 11th October, 1988 i.e. the deemed date of appointment of Commercial Inspector Grade II or from 11th September, 1989 i.e. the actual date of appointment as Commercial Inspector Grade, II, the Supreme Court observed :

" The mere fact that his promotion in Grade II was notionally made effective from 11.10.1988 cannot be taken to mean that he started gaining experience from that day, because to gain experience one has to work. Notinal promotions are given to take care of some injustice inter alia, because some junior has come to be promoted earlier. But, we entertain no doubt that the person promoted to higher grade cannot gain experience from the date of the notional promotion; it has to be from the date of the actual promotion.

Strongly relying on this passage, the learned counsel for the petitioners contended that 7 years experience as Deputy Engineer required for promotion to the post of Executive Engineer in the case of Mr.Thatte must be counted on 13th December, 1977 when he was actually posted as a Deputy Engineer and not from 1st April, 1974 which was the deemed date of his promotion to the post of Executive Engineer. In reply, learned counsel for the respondents relied upon a later judgment of the Supreme Court in Union of India v/s K.B.Rajouri reported in AIR 2000 SC 1819. In that case, one K was notionally promoted as Additional Director General in Central Public Works Department. with effect from 22nd February,1995 by an order dated 10th June, 1998. In January, 1999 he was considered for further promotion to the post of Director General. The recruitment rules provided " two years regular service" in the grade (of Additional Director General) as eligible condition for promotion as a Director General. He did not fulfil this condition if two years period was reckoned reckoned from the date of his actual promotion on 22nd February, 1995. The High Court had held that the words " regular service in the grade "

to mean actual physical service." Reversing the judgment of the High Court, the Supreme Court held that the words " regular service " did not mean actual service. The Supreme Court further held that K was promoted retrospectively from 22nd February, 1995 to set right the wrong done to him by his wrongful supercession earlier on 22nd February, 1995. Mr. K was denied the right to be considered for promotion to the post of Director General on the basis of notional promotions, it would result in perpetuating the wrong done to earlier. The Supreme Court held that High Court wrongly equated the words "regular service" with the words " actual experience " relying upon the decision of the Union of India v/s M.Bhaskar (supra).

5. Whether experience contemplated by the rules is of actual service or not would depend upon the interpretation of the rules. It is therefore, necessary to refer to the relevant rules of promotion to the post of an Executive Engineer. Rules for promotion to the post of an Executive Engineer and other officers (hereinafter referred as the Recruitment Rules, 1978) were framed by the Governor of Maharashtra in pursuance of the powers conferred under provisions of Article 339 of the Constitution

of India.

Rule II reads as under :

(II) Recruitment Rule for the post of Executive Engineer (Electrical) -

Appointment to the post shall be made either -

(a) by transfer of a suitable Executive Engineer belonging to M.S.E. Class I from the Public Works and Housing Department or Irrigation Department.

(b) by promotion of a suitable officer in Class II with not less than seven years' service as Deputy Engineer (Electrical). "

6. In pursuance of the powers conferred under Article 309 of the Constitution of India, the Governor of Maharashtra has also framed General Rules of seniority and they are titled as " Maharashtra Civil Services (Regulation of Seniority) Rules (hereinafter referred to Rules of 1982). (for short Seniority Rules, 1982). Rule 4 of Rules of 1982 lays down general principles of seniority.

Rule 7 confers a provision regarding relaxation of rules in certaincases. Sub Rule (5) of Rule 7 of Rules of 1982 reads as under :

" Assignment of deemed dates of appointment (1) Nothwithstanding anything contained in rule 4, a competent authority may, in accordance with the provisions contained inthe following sub-rules, assign to a Government servant, a deemed date of appointment to a post, cadre or service which is different from the date of his actual appointment thereto, and on such a deemed date having been

assigned, the length of his service in the said post, cadre or service shall be computed as commencing from that date." (Underlining supplied)

7. Sub Rule 5 of Rules of 1982 makes it clear that where the deemed date of appointment to a post different from the date of actual appointment is given, the length of service to the said post or cadre shall be computed as commencing from that deemed date. Thus, the fiction introduced by giving a deemed date of promotion is carried to its logical conclusion as if the deemed date is the real date of appointment to the post or cadre or service. In view of the specific rules applicable to the present case, it would have to be held that the respondent Mr. Thatte was appointed as Deputy Engineer with effect from 1st April, 1974 for all purposes. Even in the case of Union of India Vs M.Bhaskar (supra) the Supreme Court has held that the mere fact of giving deemed date of promotion is not a substitute for actual experience. But, here apart from the mere fact of giving deemed date of promotion, the Seniority Rules, 1982 provide for computing the period of service in the grade from the deemed date of appointment. Therefore, it would have to be held that the respondent completed 7 years of service as a Deputy Engineer on 1st February, 1981 and was

eligible for the appointment of Executive Engineer on or after that date.

8. Learned counsel for the petitioner contended that, as per his own affidavit the respondent Mr. Thatte passed the professional examination for promotion to the post of Superintending Engineer in November, 1982 and therefore, the respondent could have been promoted as an Executive Engineer on 1st April, 1982 which was the earlier than the date on which he passed the professional examination. Reliance was placed on Rule 3 of Recruitment Rules, 1978 which reads thus :

" The eligibility prescribed for promotion to any of these posts referred to in these rules as prescribed under Rules from (I) to (V) above shall be subject to the passing of the prescribed Professional Examination, unless as exemption or extension of time to pass the examination is granted in any particular case. "

It was not the case of respondent Mr. Thatte that exemption was granted to him for passing the prescribed professional examination as he has passed the prescribed professional examination in November, 1982. Learned counsel submits that Mr. Thatte could not have been promoted as an Executive Engineer earlier than November, 1982. Learned counsel for the private respondent contended that the professional examination was not prescribed under Rule No. 3 of

the Rules of 1978 earlier than November, 1982. As the examination was not prescribed, he could not have appeared or passed in the prescribed professional examination. Hence, the requirement for passing the prescribed professional examination was not attracted. Learned counsel submitted that the requirement for passing the prescribed professional examination was not a condition precedent but, the examination could also be passed even after the promotion and if the candidate did not pass the examination subsequently, he could be reverted. Learned counsel also invited our attention to the rules titled as " Executive Engineer (Electrical) Class-I and Deputy Engineer (Electrical) Class-II in the Dairy Development Department (Recruitment) Rules, 1989 (for short D.D. Rules, 1999) framed by the Governor under Article 309 of the Constitution of India.

Rule 6 of the D.D.Rules 1989 reads as under :

"A person appointed to the posts mentioned in rules 3 and 4 whether by promotion or by nomination, shall be required to pass the professional examination and the examinations in Hindi, Marathi and such other examinations as may be prescribed by Government from time to time according to the rules made in that behalf unless he has already passed, or has been exempted from passing, those examinations."
(Underlining supplied)

Rule 6 uses the words " A person appointed to the

post mentioned in Rules 3 and 4 (Executive Engineer) shall be required to pass the professional examination " which contemplate that the person can be appointed first and passing of the examination can be subsequent. In other words, passing of the examination before the appointment as an Executive Engineer is not a condition precedent. Admittedly, the private respondent Mr.Thatte had passed the professional examination held in November, 1982. Therefore, the contention of the petitioner that the respondent could not have been given a deemed date for promotion as an Executive Engineer with effect from 1st April, 1982 has to be rejected.

9. No other ground was canvassed before us by the learned counsel for the petitioners. As both the grounds of challenge for grant of the deemed dates for promotion to the private respondent Mr. Thattee as a Deputy Engineer and as an Executive Engineer are negatived, the petitions will have to be dismissed. Accordingly, petitions are dismissed but, without any order as to costs.

A.P.SHAH, J

D.G.KARNIK, J